

(4) *General prohibitions.* If none of the ten general prohibitions applies, you should skip the steps concerning License Exceptions and for exports from the United States, review Steps 27 through 29 concerning Shipper's Export Declarations to be filed with the U.S. Customs Service, Destination Control Statements for export control documents, and recordkeeping requirements.

(e) *Is a License Exception available to overcome the license requirement?* If you decide by reviewing the CCL in combination with the Country Chart that a license is required for your destination, you should determine whether a License Exception will except you from that requirement. Steps 20 through 24 help you determine whether a License Exception is available. Note that generally License Exceptions are not available to overcome General Prohibitions Four through Ten. However, selected License Exceptions for embargoed destinations are specified in part 746 of the EAR and License Exceptions for short supply controls are specified in part 754 of the EAR. If a License Exception is available and the export is from the United States, you should review Steps 26 through 28 concerning Shipper's Export Declarations to be filed with the U.S. Customs Service, Destination Control Statements for export control documents and recordkeeping requirements. If a License Exception is not available, go on to Steps 25 through 29.

(f) *How do you apply for a license?* If you must file a license application, you should review the requirements of part 748 of the EAR as suggested by Step 26. Then you should review Steps 27 through 29 concerning Shipper's Export Declarations to be filed with the U.S. Customs Service, Destination Control Statements for export control documents, and recordkeeping requirements.

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§ 732.2 Steps regarding scope of the EAR.

Steps 1 through 6 are designed to aid you in determining the scope of the EAR. A flow chart describing these

steps is contained in Supplement No. 2 to part 732.

(a) *Step 1: Items subject to the exclusive jurisdiction of another Federal agency.* This step is relevant for both exports and reexports. Determine whether your item is subject to the exclusive jurisdiction of another Federal Agency as provided in § 734.3 of the EAR.

(1) If your item is subject to the exclusive jurisdiction of another Federal agency, comply with the regulations of that agency. You need not comply with the EAR and may skip the remaining steps.

(2) If your item is not subject to the exclusive jurisdiction of another Federal agency, then proceed to Step 2 in paragraph (b) of this section.

(b) *Step 2: Publicly available technology and software.* This step is relevant for both exports and reexports. Determine if your technology or software is publicly available as defined and explained at part 734 of the EAR. Supplement No. 1 to part 734 of the EAR contains several practical examples describing publicly available technology and software that is outside the scope of the EAR. The examples are illustrative, not comprehensive. Note that encryption software controlled for EI reasons under ECCN 5D002 on the Commerce Control List (refer to Supplement No.1 to part 774 of the EAR) shall be subject to the EAR even if publicly available. Accordingly, the provisions of the EAR concerning the public availability of items are not applicable to encryption items controlled for "EI" reasons under ECCN 5D002.

(1) If your technology or software is publicly available, and therefore outside the scope of the EAR, you may proceed with the export or reexport if you are not a U.S. person subject to General Prohibition Seven. If you are a U.S. person, go to Step 15 at § 732.3(j) of this part. If you are a U.S. person and General Prohibition Seven concerning proliferation activity of U.S. persons does not apply, then you may proceed with the export or reexport of your publicly available technology or software. Note that all U.S. persons are subject to the provisions of General Prohibition Seven.

(2) If your technology or software is not publicly available and you are exporting from the United States, skip to Step 7 in § 732.3(b) of this part concerning the general prohibitions.

(3) If you are exporting items from a foreign country, you should then proceed to Step 3 in paragraph (c) of this section and the other steps concerning the scope of the EAR.

(c) *Step 3: Reexport of U.S.-origin items.* This step is appropriate only for re-exporters. For an item in a foreign country, you should determine whether the item is of U.S. origin. If it is of U.S.-origin, skip to Step 7 in § 732.3(b) of this part. If it is not of U.S. origin, then proceed to Step 4 in paragraph (d) of this section.

(d) *Step 4: Foreign-made items incorporating less than the de minimis level of U.S. parts, components, and materials.* This step is appropriate only for items that are made outside the United States and not currently in the United States. Note that the following encryption items are subject to the EAR even if they incorporate less than the de minimis level of U.S. content: encryption items controlled for “EI” reasons under ECCN 5A002, 5D002 or 5E002 on the Commerce Control List (Supplement No. 1 to Part 774 of the EAR) and mass market encryption commodities and software, described in the Cryptography Note (Note 3) in Category 5—Part 2 (“Information Security”) of the Commerce Control List, that have not been reviewed by BIS and released from the “EI” and “NS” controls of ECCN 5A002 or 5D002 in accordance with the requirements described in § 742.15(b)(2) of the EAR. Exporters may, as part of a review request, ask that certain 5A002 and 5D002 parts, components and software also be made eligible for *de minimis* treatment (see § 734.4(b) of the EAR). The review of *de minimis* eligibility will take into account U.S. national security interests.

(1) For an item made in a foreign country, you should determine whether controlled U.S.-origin parts, components, or materials are incorporated as provided in § 734.4 of the EAR. Also, determine the value of the U.S.-origin controlled content as provided in Supplement No. 2 to part 734 of the EAR.

(2) To determine the value of the U.S.-origin controlled content, you should classify the U.S.-origin content on the CCL, determine those items that would require a license from BIS for reexport to the ultimate destination of the foreign-made product if such parts, components, or materials were reexported to that destination in the form received, and divide the total value of the controlled U.S. parts, components, and materials incorporated into the foreign-made item by the sale price of the foreign-made item.

(3) If no U.S. parts, components, or materials are incorporated or if the incorporated U.S. parts, components, and materials are below the *de minimis* level described in § 734.4 of the EAR, then the foreign-made item is not subject to the EAR by reason of the parts and components rule, the classification of a foreign-made item is irrelevant in determining the scope of the EAR, and you should skip Step 4 and go on to consider Step 6 regarding the foreign-produced direct product rule.

(4) If controlled parts, components, or materials are incorporated and are above the *de minimis* level, then you should go on to Step 5.

(e) *Step 5: Foreign-made items incorporating more than the de minimis level of U.S. parts, components, or materials.* This step is appropriate only for foreign-made items incorporating certain U.S. parts. If the incorporated U.S. parts exceed the relevant *de minimis* level, then your export from abroad is subject to the EAR. You then should skip to Step 7 at § 732.3 of this part and consider the steps regarding all other general prohibitions, License Exceptions, and other requirements.

(f) *Step 6: Foreign-made items produced with certain U.S. technology for export to specified destinations.* This step is appropriate for foreign-made items in foreign countries.

(1) If your foreign-produced item is described in an entry on the CCL and the Country Chart requires a license to your export or reexport destination for national security reasons, you should determine whether your item is subject to General Prohibition Three (Foreign-Produced Direct Product Reexports) (§ 736.2(b)(3) of the EAR). Your item is subject to the EAR if it is captured by

General Prohibition Three (Foreign-Produced Direct Product Reexports), and that prohibition applies if your transaction meets each of the following conditions:

(i) *Country scope of prohibition.* Your export or reexport destination for the direct product is Cuba, Libya, or a destination in Country Group D:1 (see Supplement No. 1 to part 740 of the EAR) (reexports of foreign-produced direct products exported to other destinations are not subject to General Prohibition Three);

(ii) *Scope of technology or software used to create direct products subject to the prohibition.* Technology or software that was used to create the foreign-produced direct product, and such technology or software that was subject to the EAR and required a written assurance as a supporting document for a license or as a precondition for the use of License Exception TSR in § 740.6 of the EAR (reexports of foreign-produced direct products created with other technology and software are not subject to General Prohibition Three); and

(iii) *Scope of direct products subject to the prohibition.* The foreign-produced direct products are subject to national security controls as designated on the proper ECCN of the Commerce Control List in part 774 of the EAR (reexports of foreign-produced direct products not subject to national security controls are not subject to General Prohibition Three).

(2) *License Exceptions.* Each License Exception described in part 740 of the EAR overcomes this General Prohibition Three if all terms and conditions of a given License Exception are met by the exporter or reexporter.

(3) *Subject to the EAR.* If your item is captured by the foreign-produced direct product control at General Prohibition Three, then your export from abroad is subject to the EAR. You should next consider the steps regarding all other general prohibitions, License Exceptions, and other requirements. If your item is not captured by General Prohibition Three, then your export from abroad is not subject to the EAR. You have completed the steps necessary to determine whether your transaction is subject to the EAR, and you may skip the remaining steps.

Note that in summary, items in foreign countries are subject to the EAR when they are:

(i) U.S.-origin commodities, software and technology unless controlled for export exclusively by another Federal agency or unless publicly available;

(ii) Foreign-origin commodities, software, and technology that are within the scope of General Prohibition Two (Parts and Components Reexports), or General Prohibition Three (Foreign-Produced Direct Product Reexports). (However, such foreign-made items are also outside the scope of the EAR if they are controlled for export exclusively by another Federal agency or publicly available.)

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§ 732.3 Steps regarding the ten general prohibitions.

(a) *Introduction.* If your item or activity is subject to the scope of the EAR, you should then consider each of the ten general prohibitions listed in part 736 of the EAR. General Prohibitions One ((Exports and Reexports), Two (Parts and Components Reexports), and Three (Foreign-Produced Direct Product Reexports) (§ 736.2(b) (1), (2), and (3) of the EAR) are product controls that are shaped and limited by parameters specified on the CCL and Country Chart. General Prohibitions Four through Ten are prohibitions on certain activities that are not allowed without authorization from BIS, and these prohibitions apply to all items subject to the EAR unless otherwise specified (§ 736.2(b) (4) through (10) of the EAR).

(b) *Step 7: Classification.* (1) You should classify your items in the relevant entry on the CCL, and you may do so on your own without the assistance of BIS. You are responsible for doing so correctly, and your failure to correctly classify your items does not relieve you of the obligation to obtain a license when one is required by the EAR.

(2) You have a right to request the applicable classification of your item